INTERIOR BOARD OF INDIAN APPEALS

Beverly A. Smalley, et al. v. Eastern Area Director, Bureau of Indian Affairs

18 IBIA 459 (09/27/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

BEVERLY A. SMALLEY, ET AL.
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-79-A Decided September 27, 1990

Appeal from a decision recognizing the results of a tribal election.

Affirmed.

1. Board of Indian Appeals: Generally--Bureau of Indian Affairs: Generally--Indians: Tribal Government: Elections

   Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

APPEARANCES: Appellants, pro sese; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for appellee; Lloyd G. Wilcox and Lawrence E. Ollivierre for the Narragansett Indian Tribe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants, who are apparently all members of the Narragansett Indian Tribe, seek review of a March 7, 1990, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), recognizing the results of a January 27, 1990, tribal election. 1/ For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On June 30, 1987, a consent judgment was entered in Narragansett Indian Tribe v. Hodel, Civil No. 87-0169, D.D.C., concerning eligibility to vote in

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1/ Appellants are: Beverly A. Smalley, Nelson Hazard, Kim Hazard, Majorie L. Waters, Pamela L. Brown, Angela M. Brown, Kyle Brown, Ronald H. Brown, Guy Stanton, Walter K. Babcock, and Toni L. Stanton. Appellant Walter Babcock is the outgoing Chief Sachem of the Tribe. Appellant Kim Hazard is a member of the outgoing Tribal Council. Some, but not all, of the remaining appellants appear on a list of tribal members included in the record.

tribal elections. 2/ The judgment provided in paragraph 1 that an election would be held in January 1988, and in paragraph 3 that tribal members would be "eligible to vote in the 1988 election and all subsequent elections if such persons are at least eighteen years of age, remain members of the Tribe and have duly registered to vote." Paragraph 3 further provided that tribal membership would consist of:

> (a) Persons on a basic roll. Each living person of Narragansett blood whose name appears on either the Detribalization Roll of 1880-1884 or the base membership roll prepared by the BIA in 1984 from two lists submitted by the Tribe for federal acknowledgment purposes.
>
> (b) Ancestors or descendants of persons on a basic roll. Each living person of Narragansett blood, who is either a descendant or ancestor of a person whose name appears on one or both of the rolls specified in subparagraph (a) * * * regardless of whether the person whose name so appears is living or deceased, provided however, that no person enrolled as a member of some other tribe shall be eligible for membership or eligible to vote in plaintiff Tribe, and provided that the person, if at least eighteen years of age, maintains significant social and political ties with the Narragansett Indian Community.

(Consent Judgment at 2). The judgment specified procedures to be followed for the recognition of individuals as members under paragraph 3(b) and required the Tribe to furnish the Area Director with a list of the persons recognized as tribal members under that provision.

An election was apparently held in January 1988, as required by the consent judgment. Appellant Walter Babcock was elected Chief Sachem.

At a special meeting held on September 12, 1989, the Tribe voted to hold another election on January 27, 1990, and to consider as eligible to vote all those appearing on a base roll or on a list called "Technical Corrections." 3/ A second special meeting was held on October 17, 1989, at which the Tribal Election Committee (TEC) recommended that all members be required to re-register. Registration was scheduled for four Saturdays in November and December.

2/ The Narragansett Indian Tribe received Federal acknowledgment in 1983. See 48 FR 6177 (Feb. 10, 1983). It is organized under a document entitled "Constitution and Bylaws," which was filed with the State of Rhode Island in 1934 but has not been approved by the Secretary of the Interior. Regarding elections, the constitution provides only that "[t]he Bi-annual election of officers shall be held the last Saturday in January." There are no provisions concerning voter eligibility.

3/ Narragansett Tribal Resolution No. 89-02, of Feb. 21, 1989, provided for submission of this list to BIA. The resolution described it as a "list of Tribal members ending at 0386, referred to as Technical Corrections with proper documentation verifying their lineage to the Tribal Base Roll of 1880 and Membership Roll of 1980, submitted for Federal recognition."

In a letter of January 23, 1990, to the Area Director, the Chief Sachem stated that some tribal members were being denied both the right to register and the right to appeal from the denial. He asked the Area Director to "advise as to how this situation can be rectified." In another letter dated January 24, 1990, and two telefaxes dated January 26, 1990, the Chief Sachem and the Tribal Clerk/Genealogist expressed continuing concern over the refusal of the TEC to register some tribal members. Area Office staff advised the Chief Sachem that the Tribe was required to follow the procedures set out in the consent judgment in Narragansett Indian Tribe v. Hodel.

The election was held as scheduled; a new Chief Sachem, George Hopkins, was elected, as were other tribal officers and Tribal Council members. On January 31, 1990, the TEC certified the election results.

By letter of February 5, 1990, the outgoing Chief Sachem notified the Area Director that a special tribal meeting would be held on February 10, 1990, to address tribal concerns regarding the election. He requested that the Area Director hold off any decision concerning the election until after the meeting.

At the February 10 meeting, tribal members voted 54-28 to let the results of the January 27 election stand as certified by the TEC.

By resolution dated February 19, 1990, the outgoing Tribal Council declared the January 27 election null and void and scheduled a new election for April 28, 1990. The outgoing Chief Sachem sent the resolution to the Area Director, requesting that he refuse to recognize the results of the January 27 election.

On February 21, 1990 the Area Director wrote to the Chief Sachem Elect, acknowledging receipt of the certified election results and, in essence, recognizing the results of the election. On March 7, 1990, the Area Director wrote individually to the outgoing Tribal Council members who had signed the February 19 resolution, informing them of his decision to recognize the results of the election. His decision stated in part:

> [T]he general membership meeting, or general assembly meeting of February 10, 1990, was convened for the purpose of discussing and finally resolving issues attendant to the January 27 tribal election and determining whether a new election was warranted. * * *.
>
> The February 10 meeting was sanctioned and publicized by the identical persons on the tribal council who were defeated at the polls on January 27 and those persons evinced prior agreement that they would be bound by the meeting's decision, as shown by the incumbent Chief Sachem's February 5, 1990, letter to this office and their attendance at the meeting. Now that it is clear that the February 10 meeting resulted in a decision unfavorable to the 1988 tribal council, we believe that they (and you) should nonetheless remain bound by it. The February 10 meeting represented an internal appeal of alleged election irregularities and

the general assembly's decision with regard to the alleged irregularities and the election results should be final and is [sic] entitled to be recognized by this office.

We note too that although the tribal election ordinance in use for the January 27, 1990, election (which this office received one day prior to the election and was not asked to review or approve) did not provide for specific appeal procedures in the event of an election dispute, the tribal members nonetheless convened the February 10 general assembly for the purpose of hearing and resolving election disputes. It was at that meeting that all persons making allegations of irregularities and charges of denial of members' civil rights had an opportunity to be heard and their concerns addressed by the final arbiter of such matters--the general assembly.

In 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, which required Indian tribes to protect many of the individual rights that the United States Constitution requires states and the Federal Government to protect. Of course, the allegation of improper denial of some members' right to vote in a tribal election would, if proven, be an apparent violation of the Indian Civil Rights Act. However, the proper forum for redress of an Indian Civil Rights Act violation is not either the Department of the Interior or the Bureau of Indian Affairs, but is a tribal forum. The Act was also intended "to promote the well-established federal 'policy of furthering Indian self-government.'" Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978), quoting Morton v. Mancari, 417 U.S. 535, 551 (1974), and citing Fisher v. District Court, 424 U.S. 382, 391 (1976). Certainly, Indian self-government is promoted when tribes resolve their own internal disputes without intrusive interference from external agencies.

In this case, the Narragansett Tribe convened a general membership, or general assembly meeting on February 10, 1990, to resolve the issues associated with the January 27 election including, certainly, all civil rights issues. This office has no authority to intervene or refuse acceptance to the general assembly's final determination on matters related to the tribal election and attendant allegations of civil rights violations.

(Area Director's Mar. 7, 1990, Decision at 4-5). 4/

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4/ In a similar letter dated Feb. 27, 1990, the Area Director responded to a Feb. 3, 1990, request from Joseph B. Monroe, Jr., a member of the outgoing Tribal Council, that the Area Director refuse to recognize the election and that he conduct an investigation of the circumstances surrounding it. Monroe did not appeal from the February 27 letter.

Appellants' notice of appeal from this decision was received by the Board on April 12, 1990. No briefs were filed. However, the Area Director and the Tribe filed motions to dismiss the appeal. Neither motion was filed during the briefing time allowed under the Board's regulations; both were therefore untimely.

Discussion and Conclusions

Appellants contend that the January 27 election violated the rights of tribal members because it was conducted pursuant to an election ordinance which did not provide for appeals and because tribal members were disenfranchised in violation of the consent judgment in Narragansett Indian Tribe v. Hodel. Appellants further contend that qualified members were not permitted to vote at the February 10 meeting. In support of this last contention, they submit minutes of the meeting prepared by appellant Kim Hazard.

The election ordinance submitted by appellants, and identified by them as the ordinance followed in the January 27 election, does, in fact, contain appeal procedures. 5/ The record copy of this ordinance bears a typewritten date of December 1985 and a handwritten date of October 1986. It also bears the designation CBL #2, which has, however, been crossed out. Another election ordinance is also included in the record. This ordinance is undated but states that it was adapted from the tribal by-laws and CBL #2 for the January 27, 1990, election. It does not contain any provision for appeals. Neither ordinance bears any evidence that it has been enacted by the Tribal Council.

The Board is unable to ascertain from the record which, if either, of these ordinances was in effect on January 27, 1990. It appears that appellants failed to follow the appeal procedures established in the 1985/86

5/ Article XI, concerning grievance, complaint, re-count and appeal procedures, provides in part:

"Section 1. If a tribal member believes that irregularities have occurred in connection with the handling of an official tribal election, he may file a complaint in accordance with the appeal and grievance procedure outlined below:

"a. The complaint or grievance must be placed in writing and submitted to the Tribal Election Committee and Tribal Council within five days from the date of the election in which the irregularity is alleged to have occurred. * * *.

"Section 3. Appeal

"a. If the complain[an]t or any person certified as elected in the election in question is not satisfied with the findings of the Tribal Election Committee, he may petition the Tribal Council for review of his complaint by submitting a written request to the Secretary of the Council within 5 days of receipt of the response from the Tribal Election Committee. The complainant shall also enclose a copy of the original complaint and a copy of the findings of the Tribal Election Committee."

ordinance. 6/ Accordingly, if that ordinance was in effect, this appeal is subject to dismissal for failure to exhaust tribal remedies. See Totenhagen v. Minneapolis Area Director, 16 IBIA 9 (1987).

The Area Director was clearly under the impression when he issued his decision that the undated ordinance, which lacks appeal procedures, was in effect on January 27, 1990. 7/ Giving appellants the benefit of any doubt, the Board assumes, for purposes of this decision, that no formal appeal procedures were in effect and that, therefore, appellants were not required to follow any such procedures.

[1] The Area Director found that the Tribe provided a tribal forum for resolution of election disputes when it convened the February 10 tribal meeting. He held that this forum was the appropriate place for resolution of such disputes, including allegations of violation of the Indian Civil Rights Act. For the reasons discussed by the Area Director, the Board agrees. While it might appear preferable for the Tribe to establish and follow a formal procedure for the resolution of election disputes, in the absence of such a procedure, the Tribe appropriately convened a meeting of the entire membership. The results of such a meeting should be entitled to deference by BIA and the Board. See, e.g., Wheeler v. U.S. Department of the Interior, 811 F.2d 549 (10th Cir. 1987), holding that, because the Cherokee Nation provided a tribal forum for the resolution of election disputes, the Department had no authority to take action contrary to the tribal resolution of such disputes.

On appeal to the Board, however, appellants challenge the validity of the February 10 meeting on the grounds that qualified voters were prevented from voting at the meeting. The Board has reviewed the materials submitted by appellants and finds no evidence to support this contention. In fact, appellants' own minutes record a complaint by one person that individuals were allowed to vote at the meeting although they had not been recognized as eligible to vote in the January 27 election. Further, the record includes a roster on which appear the signatures of the tribal members who voted at the February 10 meeting. This roster includes the signatures of at least two individuals who stated they were not permitted to register for the election. 8/ The Board finds that appellants have failed to support their contention that qualified voters were prevented from voting at the February 10 meeting. Further, the Board finds that they have not shown any basis for concluding that the meeting was invalid.

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6/ The record contains a protest addressed to the Tribal Council, signed by appellant Marjorie Waters and one other person. It is dated Feb. 21, 1990, and does not appear to be in compliance with either section 1.a or section 3.a of Article XI.

Appellants do not contend, and the record does not show, that they attempted to follow the procedures in the 1985/86 ordinance.

7/ It appears from the record in this appeal that the Tribe does not routinely submit its ordinances to BIA for approval, or even for informational purposes. This ordinance was sent to the Area Director by outgoing Tribal Council member Joseph Monroe with his Feb. 3, 1990, letter. See n. 4, supra.

8/ These are Joseph Monroe and appellant Beverly Smalley.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Eastern Area Director's March 7, 1990, decision is affirmed. 9/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

9/ Although it affirms the Area Director's decision, the Board notes that there appear to be still unresolved issues concerning the eligibility of some individuals to vote in tribal elections. Under the consent judgment in Narragansett Tribe v. Hodel, all tribal members at least 18 years old are entitled to vote provided they are duly registered. The judgment does not vest BIA with any specific enforcement authority. It is the Tribe's responsibility to ensure compliance with the judgment, as well as the Indian Civil Rights Act, in its determination of tribal membership and registration of voters.